Case No: CO/3777/2014

Neutral Citation Number: [2015] EWHC 189 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2015

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

- -

Between :

ECOTRICITY NEXT GENERATION LTD	**Claimant**
- and -	
1. SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
2. TORRIDGE DISTRICT COUNCIL	

- -
- -

Mr Jeremy Pike (instructed by **Ecotricity Legal Dept.**) for the **Claimant**
Mr Daniel Kolinsky (instructed by **The Treasury Solicitor**) for the **First Defendant**
Second Defendant did not appear and was not represented

Hearing date: 28 January 2015

- -

Judgment

Mr Justice Supperstone :

Introduction

1. This is an application made under s.288 of the Town and Country Planning Act 1990 (as amended) to quash the decision of the Defendant (given by his Inspector) dated 7 July 2014, to refuse an appeal to grant planning permission for a wind energy development comprising the erection of one wind turbine, with a maximum overall height of up to 84 metres together with access tracks, crane pad areas, electricity sub-station, temporary construction compound and amended vehicular access on agricultural land at Witherdon Wood near Ashwater in Devon ("the proposed development").

2. The appeal was determined by written representations. The Inspector undertook a site visit on 24 April 2014.

The Inspector's Decision Letter ("DL")

3. In DL3 the Inspector identified the main issue in the appeal as whether the benefits of the scheme, including the production of electricity from a renewable source, outweigh any harmful impacts, having regard in particular to four matters, two of which are of relevance for present purposes: first, the effect upon the character and appearance of the area including any cumulative impact arising from other permitted wind turbines within the area; and second, the effect upon the setting of designated heritage assets.

4. In DL4-7 the Inspector identified the relevant planning policies at local and national level. She identified that she had regard to the Council's Landscape Sensitivity Assessment.

5. The Inspector dealt with the landscape impact of the proposed development in paragraphs 8-16 of the Decision Letter.

6. DL9, which is the subject of criticism by the Claimant, reads as follows:

> "The appeal site is not in any designated area but the Joint Landscape Character Assessment adopted by Torridge and North Devon Council identifies the site is within an area defined as 1F: Farmed lowland moorland and culm grassland with high levels of tranquillity and remoteness. The landscape strategy for the Landscape Character Area advises that to protect these characteristics new development on prominent open ridgelines should be avoided and that the area has a moderate to high sensitivity to large turbines (76-110m) and has a high sensitivity to larger turbines. While there is reference to increased sensitivity in some circumstances the strategy is for a landscape with occasional single or small sized clusters of turbines. The strategy for the adjoining area, which includes Carey valley and part of which is less than a kilometre from the site, is for a landscape with occasional wind energy developments (very small or small scale single turbines linked to buildings)."

7. At DL11 the Inspector noted the "proposal would result in the introduction of a tall, man-made addition to the rural landscape which is largely free of vertical features".

8. At DL13 she said that the proposed wind turbine would be a prominent addition to the local surroundings; it would exceed the height of the closest trees and be seen from many places throughout the local area. She continued:

> "While it would not fall within the definition of a very large turbine, and would have a moderate to high effect on the upper slopes, it would be a defining feature of the smaller scale landscape of the River Carey valley. While I have had regard to the limited life of the proposed scheme, as a result of its size and man-made form the wind turbine would be an alien and incongruous feature in the remote and tranquil landscape and would have a significant detrimental effect."

9. At DL15 the Inspector considered the cumulative effect of the proposal and other wind turbines in the area and concluded that the cumulative effect of wind turbines in the area would be minor.

10. At DL16 she concluded that the proposed development would be harmful to the character and appearance of the local landscape to which she attached significant weight; thus, she said, the proposal conflicted with the development plan policies identified in that paragraph.

11. At DL17-23 the Inspector dealt with the relationship of the proposal with heritage assets. Thorn Barrow is a Scheduled Ancient Monument in respect of which she shared English Heritage's concerns that there is insufficient information to make an informed judgment on the effect on this heritage asset.

12. Of particular importance for the purposes of the present challenge is the church of St Peter at Ashwater, which is a Grade 1 listed building. At DL19 the Inspector states:

> "The tower of the church would have been deliberately designed to be the highest building in the area and the village and surrounding countryside contribute to the setting of the church. The church tower would be seen in the same views as the turbine and so the turbine would be apparent in the setting of this heritage asset."

13. At DL23 the Inspector concludes her analysis of Heritage Assets as follows:

> "While I have not been able to reach a conclusion in respect of Thorn Barrow, I conclude that there would be a minor negative impact on the setting of listed buildings albeit comprising less than substantial harm to the heritage assets in the area. Consequently, the proposed development would be contrary to the aims of saved Local Plan Policies DVT7, ENV1 and ENV5 which encourage respect for context and the setting of historic buildings."

14. At DL24-30 the Inspector considers living conditions; the rural economy at DL31; and the totality of the benefits of the proposal which she describes as carrying considerable weight in this appeal at DL32.

15. Under the heading *Balance* at DL33 and 34 the Inspector states:

> "33. I have concluded there would be harm to the character and appearance of the local landscape and that this warrants significant weight. There would also be some minor harm to heritage assets. There would be conflict with the development plan in respect of these matters. Although the harm to the setting of listed buildings would be less than substantial, I am required (by section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990) to give considerable importance and weight to the desirability of preserving the setting of listed buildings. Whilst it has not been shown that the scheme would have a negative impact on the rural economy it would be detrimental to the living conditions of local residents and this warrants significant weight.
>
> 34. The proposal would provide a valuable contribution to cutting greenhouse gas emissions and this warrants great weight. However, this would not outweigh the harm I have identified. Paragraph 98 of the Framework states that Councils should approve renewable energy applications, provided that impacts are or can be made acceptable. In this case the impacts could not be made acceptable and therefore the proposal would be contrary to paragraph 98 and also paragraph 14 of the Framework, which sets out the conditions for decision-making for sustainable development."

Relevant Legal Principles

16. In *Bloor Homes East Midlands Ltd v Secretary of State for Communities & Local Government* [2014] EWHC 754 (Admin) at para 19 Lindblom J recently summarised the relevant legal principles, which, so far as they are material, are as follows:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to 'rehearse every argument relating to each matter in every paragraph' (see the judgment of Forbes J in *Seddon Properties v Secretary of State for the Environment* [1981] 42 P&CR 26 at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the

> ‘principal important controversial issues’. An inspector’s reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and anr v Porter (No. 2)* [2004] 1 WLR 1953 at p.1964 B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, ‘provided that it does not lapse into *Wednesbury* irrationality’ to give material considerations ‘whatever weight [it] thinks fit or no weight at all’ (see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 at p.780 F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector’s decision (see the judgment of Sullivan J, as he then was, in *Newsmith v Secretary of State for the Environment, Transport and Regions* [2001] EWHC 74 Admin, at paragraph 6).

[Sullivan J in *Newsmith* at paragraph 6 observed:

> “Moreover, the Inspector’s conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received at the site inspection.”]

> “(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] PTSR 983, at paragraphs 17-22).
>
> (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the

> policy in question (see the judgment of Hoffmann LJ, as he then was, in *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P&CR 80, at p.83 E-H)."

17. Three additional principles are relevant in the present case.

18. First, the decision maker is under a duty to properly inform himself of the information relevant to his decision. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 Lord Diplock at 1065 stated:

> "… The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

19. Second, mistake of fact giving rise to unfairness is a separate head of challenge on an appeal on a point of law. In order for a court to make a finding of such unfairness it would have to be shown that the tribunal whose decision was under appeal had made a mistake as to an established fact which was uncontentious and objectively verifiable, including a mistake as to the availability of evidence on a particular point, that the appellant or his advisers had not been responsible for the mistake, and that the mistake had played a material though not necessarily decisive part in the tribunal's reasoning (*E v Secretary of State for the Home Department* [2004] QB 1044 at para 66, per Carnwath LJ (as he then was), delivering the judgment of the court).

20. Third, in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137, the Court of Appeal gave guidance in respect of the approach to be adopted to s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 at paragraph 29:

> "Parliament's intention in enacting s.66(1) was that decision makers should give 'considerable importance and weight to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise'."

Grounds of Challenge

21. Mr Jeremy Pike, for the Claimant, advances two grounds of challenge:

    i) That the Inspector failed to have proper regard to material considerations in the form of the Council's Landscape Character Assessment and Landscape Sensitivity Assessment; failed to make a finding as to whether the proposal complied with the strategy; and failed to give adequate reasons for her decision.

    ii) That the Inspector erred in her findings and conclusions on heritage assets.

Discussion

Ground 1: the Inspector's findings and conclusion in respect of the Council's Landscape Character Assessment and Landscape Sensitivity Assessment

22. Mr Pike submits that the landscape character and sensitivity assessments were clearly relevant material considerations, to which the Inspector herself referred. The purpose of the sensitivity assessment was to enable the Council "to make robust, well-informed decisions on the planning applications received for wind and solar PV developments" (para 1.6; and also see the character assessment at para 1.1). However in DL9 (1) not only did the Inspector incorrectly conflate aspects of the two documents as originating solely from the Landscape Character Assessment, but (2) she failed to record fully and accurately the advice in the Landscape Sensitivity Assessment (by omitting the crucial words "comprising turbines that may be up to and including sizes in the large category" that applied to the proposed development), and (3) importantly she failed to express any conclusion on whether the proposed development accorded with the aims of either the Landscape Character Assessment or the Landscape Sensitivity Assessment.

23. The Defendant's officer's report to the Defendant's Development Control Committee advised that, in the view of Officers, the proposed development would fulfil the strategies of the two assessments and would be compliant with relevant development plan policies concerning landscape and visual effects.

24. On 21 May 2013 the Second Defendant refused planning permission for the proposal for the following reason:

> "The proposed turbine by reason of its siting and height would result in significant adverse visual impacts on the character and appearance of the surrounding landscape. It would result in the introduction of a large vertical element into the landscape with significant visual impacts on the surrounding landscape. This is considered to be contrary to the aims of Torridge District Council's 'Landscape Sensitivity Assessment for Torridge: and Assessment of the Landscape Sensitivity to Onshore Wind Energy and Field Scale Photovoltaic Development' and Policies DVT2C, DVT6, DVT7, ENV1 and ENV5 of the Torridge District Local Plan and the objectives of the National Planning Policy Framework."

25. It is common ground that the two assessments were relevant material considerations. However the Inspector failed to express any conclusion on whether the proposed development accorded with the aims of either the landscape character assessment or the landscape sensitivity assessment. Mr Pike submits that the Inspector was obliged to express a conclusion on whether the proposal was in accordance with the objectives of those two assessments or not, it being a principal important controversial issue between the parties (see *South Bucks DC v Porter (No.2)* [2004] 1 WLR 1953, per Lord Brown at paras 35-36). He suggests it was bizarre for the Inspector not to express a conclusion on this issue, having raised it herself and in the light of the reason given by the Defendant for refusing permission. If, as the Claimant submits,

the proposal was compliant with the strategy that was a matter the Inspector should have taken into account in the balancing exercise.

26. Mr Pike submits that if the Inspector had addressed the guidance in the landscape sensitivity assessment she would have concluded that the proposed development, being a single turbine of 84 metres in height, was a single turbine which was at the lower end of the "Large" category, and therefore in accordance with the strategy in the landscape sensitivity assessment for the area.

27. Further Mr Pike submits that the Claimant has been severely prejudiced by the Inspector's failure to give adequate reasons in this regard. If the Inspector considered that the proposal accorded with the aims of the two assessments, it is not possible to tell whether or not that affected her other conclusions; and if she reached the contrary view, the Claimant is not able to tell from the decision why she might have reached that conclusion.

28. Mr Daniel Kolinsky, for the Secretary of State, does not accept that the Inspector misunderstood in substance any part of the analysis contained in the landscape sensitivity assessment or the landscape character assessment.

29. In my view DL9 makes clear that the Inspector understood that the strategy was for a landscape with occasional single or small size clusters of turbines and that the sensitivity to large turbines was "moderate to high", thus their presence was not ruled out. It was not in issue that a single turbine of the large size proposed might be appropriate subject to its actual landscape effect.

30. What was in issue was the assessment of what the effect of the proposed single large turbine in this location in fact was (see paras 6.8 and 6.12 of the Sensitivity Assessment). I agree with Mr Kolinsky that the Inspector's focus was correctly on the impact of what was proposed and the conformity of the scheme with the development plan policies. The Inspector was not required to set out full particulars of the circumstances in which a single large turbine might be acceptable, but to decide whether this specific proposal was, having regard to its proposed impacts.

31. In my view, reading the decision as a whole and in a straight-forward way, as one must, it is in fact clear that the Inspector had in mind the important characteristics relevant to the assessment of character. These include, as I have noted, the potential acceptability of a single turbine in this area; and the fact that it would be a defining feature of the smaller scale landscape of the River Carey valley. DL13 refers to the wind turbine as being "an alien and incongruous feature in the remote and tranquil landscape", and that it "would have a significant detrimental effect" (see para 8 above). DL9-13 make clear that the Inspector had regard to the guidance against siting wind turbines in prominent locations and the need to assess carefully the relationship between the proposed development and other wind turbine development in the locality.

32. I reject the submission that the Inspector misunderstood the guidance contained in the landscape sensitivity assessment or the landscape character assessment. Based on her assessment of the material submitted to her, the written representations and her site visit, she decided that the impacts of the proposed development would not be acceptable. This was a conclusion for which, in my view, she gave adequate reasons.

Ground 2: Heritage Assets

33. In summary this ground consists of three points. First, Mr Pike submits that the Inspector was not entitled to find, as she did in DL19, that the village and surrounding countryside contribute to the setting of the church. Second, he submits that it was simply wrong to find, as the Inspector did, that the church tower would be seen in the same views as the turbine. Third, the Inspector's reasoning in paragraphs 17-23 fails to explain where the "minor negative impact on the setting of listed buildings" (the conclusion recorded in DL23) was to be found.

34. In support of these submissions Mr Pike relied on a witness statement dated 22 August 2014 made by Mr Gregg, a project manager employed by the Claimant. Mr Gregg stated that no party to the appeal suggested that the church tower would be seen in the same views as the turbine, and that as a matter of fact that is not so. He said that it was his understanding that the documents before the Inspector included (1) the Environmental Report (submitted by the Claimant in October 2012) ("the ER"); and (2) the Supplementary Information on the impact of the Proposed Wind Turbine on listed buildings (submitted by the Claimant in April 2013). The landscape and visual assessment and cultural heritage assessment set out in the ER relied in part upon Zone of Theoretical Visibility (ZTV) studies, photomontages and wireline diagrams as a means of assessing the visual effect of wind turbines on the landscape and features within it.

35. Mr Gregg states that as part of a preliminary desktop assessment he undertook a ZTV study of St Peter's Church to find areas where the church would be visible locally. He then compared the results with the ZTVs submitted in the ER showing areas where the turbine would potentially be visible. His statement continues as follows:

> "19…From my initial desktop study I found a couple of areas where there was the potential for views of the proposed turbine and the church. I then used aerial photography and street view tools from Google Earth to assess these potential views further in an attempt to verify areas along the road network from which the church and turbine would be visible. I was unable to verify whether there were indeed any views of the church and turbine together in these areas.
>
> 20. I also searched through the photomontage views presented in the ER but I was unable to find any views of St Peter's Church together with the turbine.
>
> 21. Mindful that the photomontage views in the ER are presented in a frame with a 70 degree horizontal field of view centred on the proposed turbine I was aware that the church may be visible from the viewpoints outside of the horizontal field of views presented.
>
> 22. I looked at the panoramic photomontage images prior to them being cropped for ER presentation and was able to find just one representative photomontage viewpoint (Viewpoint 4) where the turbine and church would be seen outside of the field

> of view presented in the ER. Viewpoint 4 ('Landhill PRoW west of village') is 4.1km from St Peter's Church and 2.2km from the proposed turbine location. From this viewpoint the church tower appears distant on the horizon through a gap in intervening vegetation just to the right of view presented in the ER. …
>
> 23. This particular issue was not raised previously by Torridge District Council, by English Heritage or by the Inspector. Had it been raised, we would have had the opportunity to undertake further assessment work and make representations to the Inspector on the extent to which (if at all) there could be views of both the church tower and the proposed turbine, and whether any such views (if available) would have resulted in any effect upon the setting of the church. As explained above, I have only been able to identify one location at which there could be a distant view of the church tower, behind the proposed turbine."

36. The Inspector's analysis of the setting of the church would have been informed by her site visit. Her statement that "the village and surrounding countryside contribute to the setting of the church" is unsurprising. In my view it is a finding that the Inspector was entitled to make having visited the site and viewed the setting of the church.

37. However the same cannot be said for the statement that "The church tower would be seen in the same views as the turbine and so the turbine would be apparent in the setting of this heritage asset". The assessment of whether or not "the church tower would be seen in the same views as the turbine" was necessarily a theoretical exercise. The conclusions reached by Mr Gregg were as a result of the desk-top and detailed analysis that he conducted. A site visit may assist an Inspector to follow the analysis that has been done, but whether or not "the church tower would be seen in the same views as the turbine" is not a matter of planning judgment.

38. The evidence of Mr Gregg has not been challenged.

39. Mr Kolinsky submits that DL19 should not be read literally, but as encompassing both the view of the church tower (A) and the turbine (B) from a third location (C), and the view of the church tower and turbine from each other. I reject this submission. The words used by the Inspector are clear. They do not extend to the second of the two elements suggested by Mr Kolinsky. I agree with Mr Pike that support for his interpretation of DL19 is to be found in the approach adopted by the Inspector to the setting of the group of buildings at Foxhole Manor in DL21. The Inspector notes in respect of those buildings that "while the wind turbine would be intrusive in views from the group of buildings it would not generally be seen when looking towards the buildings in their setting and there would be little detriment to the setting of these heritage assets". I consider it is clear that in DL19 the Inspector was concerned with the view towards the church, not the view from the church.

40. I am satisfied that the finding in DL19 that "The church tower would be seen in the same views as the turbine", properly construed, amounts to "a mistake as to an established fact which was uncontentious and objectively verifiable" (see para 19 above).

41. Further, in my view, the mistake played a material part in the Inspector's reasoning. Her finding in DL19 that "the turbine would be apparent in the setting of [the church tower]" flowed from the mistake of fact. Significantly her conclusion in DL23 that "there would be a minor negative impact on the setting of listed buildings albeit comprising less than substantial harm to the heritage assets in the area" derived in the main from the findings she made in DL19 in relation to the church of St Peter.

42. Mr Kolinsky suggests that the Inspector's assessment of "less than substantial" harm resulting to the Grade 1 listed church was consistent with the assessment which the Claimant had undertaken as recorded in materials in support of the application (see, for example, ER at 4.99 and Table 4.6). However, as Mr Pike points out the Claimant's evidence is that the impact is "slight" (see for example Table 4.6 of the Sensitivity Assessment and para 2.2.1 of the Claimant's supplementary information), rather than "minor". Moreover, and importantly, the Inspector did not explain to which if any of the heritage assets she attributed a "minor negative" impact as a result of the proposed development.

43. In my view the conditions for the application of the principle that mistake of fact may give rise to unfairness are satisfied in the present case. I consider that the Inspector proceeded on the basis of an error of fact in relation to the church of St Peter which played a material part in the decision she reached. This, in the circumstances (see para 23 of Mr Gregg's witness statement at para 35 above), gave rise to unfairness to the Claimant and amounts to an error of law. Alternatively, and I agree with Mr Pike, the Inspector fell into error by failing to properly inform herself of the information (namely the evidence referred to by Mr Gregg which was in the ER, see para 34 above) relevant to her decision.

44. I accept the submission made by Mr Pike that, having regard to section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, there is at the very least the possibility that the overall balance would have been different if the Inspector had proceeded to determine the appeal on the correct factual basis.

45. Further, in my view, the Claimant is prejudiced by the inadequacy of the reasoning in DL17-23, in particular as to which, if any, heritage assets were subject to a "minor negative" impact from the proposed development.

Conclusion

46. For the reasons which I have given this challenge succeeds on ground 2. Accordingly the application is allowed.

If you require an alternative accessible version of this document (for instance in audio, Braille or large print) please contact our Customer Services Department:
Telephone: 0370 333 0607
Fax: 01793 414926
Textphone: 0800 015 0516
E-mail: customers@HistoricEngland.org.uk